IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2875 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SS PATHAK

Versus

STATE OF GUJ &OTHERS

Appearance:

1. Special Civil Application No. 2875 of 1995

MR CB DASTOOR for Petitioner No. 1

MR PD BHATE, AGP for Respondent No. 1,3

MR HS MUNSHAW for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 09/03/2004

ORAL JUDGEMENT

1. The petitioner is widow of one

Subhashchandra P. Pathak, who worked as Teacher in the school of District Panchayat at Amreli. He expired on 26th January, 1996 while in the service rendering his family in a pitiable condition. Since his widow i.e. the present petitioner was the only person to look after the young children, she made an application for compassionate appointment and she was given appointment on the post of Junior Clerk on temporary basis vide order dated 2nd April, 1988 on the conditions mentioned in the said order. It was stated in one of the conditions that she had to appear in the selection process meant for the Junior Clerk and if she failed to clear the same, her service would be terminated.

1.1. The petitioner was required to appear in pre-service training examination in accordance with the instructions contained in the circular dated 12th May, 1977 issued by the General Administration Department (GAD) in relation to the compassionate appointment. She was to be given two more chances by way of grace as per the guidelines contained in the communication dated 1st August, 1989. In the said communication the concerned authorities are also instructed to obtain prior approval of the G.A.D. before effecting termination of the concerned person on account of non-clearance of aforesaid examination. It appears that despite the requisite number of chances, the petitioner could not pass the examination and, therefore, her service was terminated by a common order dated 13th March, 1995 passed in respect of other five employees also. It is this order, which is now being challenged by the petitioner in this petition.

1.2. This Court [Coram : R.K. Abichandani, J.], while admitting the petition, directed the respondents to consider absorption of the petitioner in Class-IV post upon her making such application. The respondents were also directed to consider the matter sympathetically and take decision within four weeks thereof. However, according to Mr. Dastoor, the petitioner has not been communicated ay such decision.

2. Mr. Dastoor has submitted that the petitioner could not clear the examination despite adequate number of chances having been given to her only because she was having language problem she being a Maharashtrian lady. He has further submitted that she was appointed on the post of Junior Clerk and at the time of termination of service she had crossed the age of 45 years as can be seen from the date of her birth given in the birth certificate annexed to the petition. Hence she ought to have been exempted from appearing in such

examination. He has further submitted that inspite of the clear instruction before terminating the service of the petitioner, no approval has been sought for from the G.A.D.

2.1. Mr. P.D. Bhate, Ld. AGP appearing for respondent no. 1 has submitted that he was required to clear the examination, but that has not been done and, therefore, in accordance with the terms of the order of appointment, her service was liable to be terminated. He has further submitted that her appointment being on ad-hoc basis and subject to clearance of examination, she could not be continued in service as she had not fulfilled the criteria of passing the examination.

2.2. No affidavit-in-reply has been filed by any of the respondents as can be seen from the record of this petition.

3. On going through the record of this petition, it clearly appears that the petitioner, at the time of compassionate appointment in April 1988, was aged 40 years, as her birth date is 27th September, 1948. She had reached the age of 45 years in the year 1993. When her service had been terminated vide order dated 24th February, 1995, she had already crossed the age of 45 years. This Court [Coram : S.K. Keshote, J.] in the case of Kokilaben Harshadrai Pancholi v/s. Development Commissioner reported in 1998 (2) GCD 1058 (Guj) has held as under :-

> "Once compassionate appointment is given it cannot be taken away at a later point of time under the pretext of non-fulfilling certain service conditions. As junior clerk is concerned there is no complaint.
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> Appointment of the petitioner, which was made on compassionate ground, is not made under the said service rules, but it has been made under Government Resolution. So specifically those rules were not made applicable to this category of employees. Even if there is some resolution of the Government which provides for passing of the examination by these persons, then it cannot be said to be reasonable and justified."

3.1. Thus, in the facts of that case and the present case are very similar. When the appointment is made by virtue of the Government Resolution, the criteria for appointment on the compassionate ground differs and

it stands on total different footing as held by this Court in aforesaid decision. The appointment which is given on the ground of compassion cannot be taken away for the reason that the concerned appointee is not able to clear the examination. It is obvious that the petitioner is Maharashtrian having small children to look after and in such circumstances, it was difficult for her to get prepared for the examination and to clear the same especially when the local language was stranger to her. Secondly there is nothing on record to show that before terminating the service, prior approval of G.A.D. has been obtained as per instruction contained in communication dated 1st August, 1989. The order of termination for that reason also becomes bad in law and requires to be quashed and set aside and it is ordered to be quashed and set aside.

3.2. The petition was admitted on 10th May, 1996 with direction that it should be placed for final hearing on 24th June, 1996. However, no attempt seems to have been made on behalf of the petitioner to get the matter heard at the earliest. When this Court had given chance to the petitioner for early hearing and the same has not been availed of, no direction for payment of back wages can be given. In such circumstances, the respondents are directed to reinstate the petitioner on her original post with continuity of service and all other incidental benefits except the payment of back wages.

The petition is allowed. Rule made absolute with no order as to costs.

[AKSHAY H. MEHTA, J.]

* Pansala.